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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO GALLEGOS ROBLES,

Defendant and Appellant.

B173598

(Los Angeles County
Super. Ct. No. PA040840)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Irma Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin, Supervising Deputy Attorney General, and David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

Ernesto Gallegos Robles was convicted of nine counts of premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a)),¹ with true findings on allegations as to count 1 that he personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)) and, as to all nine counts, that he personally and intentionally discharged and used a firearm within the meaning of sections 12022.5, subdivision (a)(1), and 12022.53, subdivisions (b) – (c). Robles was sentenced to state prison for nine consecutive life terms, plus 25 years to life for the count 1 enhancement, plus 20 years each for the section 12022.53, subdivision (c), enhancements ancillary to counts 2 through 9. Robles appeals, claiming there is insufficient evidence that he intended to kill the victims, and contending there were instructional and sentencing errors. We reject his arguments and affirm the judgment.

FACTS

These crimes are the product of a violent feud between two gangs with adjoining "territories," the Pacoima Van Nuys Boys Gang and the Project Boys. Retaliatory shootings were common, and one of the Project Boys members (Victor Estrada) was shot on March 16, 2002. Robles is a member of the Pacoima Van Nuys Boys.

The next day, March 17, Juan Lara and Ralph Macias (both Project Boys members) were in Lara's brown Buick, stopped in front of a house where several of the Pacoima Van Nuys Boys members lived (11101 Glenoaks). The car was blocking traffic and two police officers who were traveling by in the opposite

¹ All section references are to the Penal Code.

direction saw the passenger (Macias) extend his arm, point a handgun in the direction of 11101 Glenoaks, and fire six to eight shots. Lara, the driver, looked up, saw the officers, and uttered an obscenity. Lara and Macias pulled hoods over their heads and Lara drove off. As the officers made a U-turn and gave chase, they heard six to eight shots fired from the area of the Glenoaks house. Lara ultimately crashed and tried to run, but was found by another officer, to whom Lara bragged, "We're even doing drive-bys in front of you guys. It's all about the violence. Fuck it. There's no turning back." Expended nine-millimeter shell casings were found in the front passenger area of the Buick.

Meanwhile, just after Lara drove away from the Glenoaks house, Robles (semi-automatic assault rifle in hand) ran out of the house and fired six to eight shots in the direction of the departing Buick. He hit two passing cars.

Maria Amaya (count 6), Manuel Garcia (count 8), and Jilberto Hernandez (count 9), along with Maria Amaya's three children, Ana (count 7), Manuel, and Margarito, all in a Volvo, had stopped behind Lara's Buick. Maria Amaya saw Macias shoot at the house and saw Lara drive off. As Maria Amaya started to drive away, shots were fired from behind her car. Nine-year-old Ana Alisa Amaya was hit by one of two bullets that entered the car.

Marisol Castillo (count 2), Michele Quintanilla (count 1), Manuel Venegas (count 4), Richard Castillo (count 5), and Delores Cabrera (count 3), all in a Nissan Pathfinder, were also on Glenoaks at the time Robles shot at the fleeing Buick. The Nissan (driven by Cabrera) passed Lara's Buick at the time Macias shot at the house (Castillo saw the shooting), and was in front of the Buick as the two cars moved down the street, at which time Castillo was shot in the head

and shoulder, and two-year-old Michele Quintanilla was struck by bullet fragments on the side of her head and on her chin.

In addition to the victims, there were other witnesses. Eleuterio Gutierrez saw Macias shoot at the house, then saw Robles come out of the house with a military-style assault rifle and fire numerous shots at the departing Buick. Gutierrez gave the police a description of Robles and his weapon. Robles was apprehended shortly thereafter, and (later that evening) Gutierrez identified Robles as the person who came out of the house and shot at the cars.

When the house at 11101 Glenoaks was searched that evening, the officers found 13 firearms in a vehicle parked on the property and three firearms in the house. Inside the house, they also found shell casings, magazines, live rounds, and other firearm-related evidence, as well as photographs of Robles and others displaying Pacoima Van Nuys Boys gang signs. A firearms expert determined that casings found at the scene of the shooting were fired from one of the firearms found in the car at the Glenoaks house.

Robles was charged with nine counts of attempted premeditated murder, with the allegations noted at the outset. At trial, the People presented evidence of the facts summarized above. In addition, there was evidence that Maria Amaya's Volvo had been struck at two points, and one bullet had entered the back of the left rear passenger seat and went through that seat. The Nissan had been hit by a bullet that entered through the rear and traveled through the car. In short, both cars were shot at by someone from behind the cars.

The jury rejected Robles's alibi defense and convicted him as charged.

DISCUSSION

I.

Robles contends there is insufficient evidence to support the attempted murder convictions because, he claims, "there was no evidence he intended to kill the people who were in the Volvo and the Nissan Pathfinder." We disagree.

In *People v. Bland* (2002) 28 Cal.4th 313, our Supreme Court explained that the fact that a defendant "desires to kill a particular target does not preclude finding that [the defendant] also, concurrently, intended to kill others within . . . the 'kill zone.'" (*Id.* at p. 329.) Although "the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what [is] termed the 'kill zone.' "The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, . . . consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire The defendant has intentionally created a 'kill zone' to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets . . . , the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the

factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone. . . .' [Citation.]" (*People v. Bland, supra*, 28 Cal.4th at pp. 329-330.)

We reject Robles's contention that his victims were not in the kill zone because they were not in the "immediate vicinity" of Lara's Buick. The point is that Robles was shooting at the Buick and intended to kill its occupants as well as anyone unfortunate enough to be in his way, and the question is whether the actual victims were in the zone of harm, not whether they were tethered to the original target. Robles's case presents substantially the same scenario as the example given in *Bland* and quoted above, and as in the case of *People v. Vang* (2001) 87 Cal.App.4th 554, 563-565, where the court affirmed 10 counts of attempted murder notwithstanding the fact that the defendants may have targeted only one person at each of the two houses they shot at. In *Vang*, another gang shootout case, the court put it this way:

"The jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up." (*People v. Vang, supra*, 98 Cal.App.4th at pp. 563-564.) In our case, the jury drew a reasonable inference, in light of the direction of the shots, the number of shots, and the use of a semi-automatic military-style assault rifle, that Robles harbored a specific intent to kill every living being necessary to accomplish the killing of the Buick's occupants. For this reason, the convictions are supported by substantial evidence of the required intent.

II.

Robles contends the trial court "misled" the jury about the required intent by instructing the jurors according to CALJIC No. 8.66.1. We disagree.

The jurors were instructed that "[a] person who primarily intends to kill one person may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' is an issue to be decided by you."

Robles concedes the instruction is based on *Bland*, but contends it is inadequate because it does not require the jury to find that he "specifically intended to kill each victim" and impermissibly permits the jury to convict if it finds a "concurrent" intent that Robles acted "to ensure harm to the primary victim by *harming* everyone in the victim's vicinity." Robles is taking phrases out of context, and ignoring the instruction's direction to the jurors that it is up to them to decide whether the "perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone'"

The instruction is an accurate statement of the rule announced in *Bland*.

III.

Robles contends the trial court erred when it refused to instruct the jury on the lesser included offense of attempted voluntary manslaughter based on

sudden provocation and heat of passion (a refusal based on the trial court's finding that there was "no evidence of heat of passion, or . . . imperfect self-defense"). Robles is wrong.

Robles's contention that there was "great provocation" fails because a reasonable person would not have been provoked to act as Robles acted. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215-1216.) Keeping in mind that we are *not* talking about transferred intent but about a specific intent to harm the actual victims, all of whom just happened to be in the wrong place at the wrong time, no rational human being would describe Robles's conduct as reasonable. (*People v. Lee* (1999) 20 Cal.4th 47, 59 [the provocation that incites homicidal conduct in the heat of passion must be "caused by the victim" or somehow reasonably related to the victim]; see also *People v. Spurlin* (1984) 156 Cal.App.3d 119, 126.)

IV.

Robles contends the stayed firearm enhancements should have been stricken. We disagree.

The jury found all of the alleged firearm discharge and use enhancements were true. As noted at the outset, the trial court sentenced Robles to prison for nine consecutive life terms, plus 25 years to life for the section 12022.53, subdivision (d), enhancement on count 1, and 20 years for each of the section 12022.53, subdivision (c), enhancements on counts 2 through 9. The remaining firearm use enhancements on counts 1 through 9 (§§ 12022.5, subd. (a)(1), 12022.53, subds. (b), (c)) were imposed and stayed. When the trial court decided to stay rather than strike the latter enhancements, it relied on *People v.*

Bracamonte (2003) 106 Cal.App.4th 704, which held the enhancements should be stayed and not stricken.

As he did in the trial court, Robles claims on this appeal that the contrary view expressed in *People v. Woods* (2004) 119 Cal.App.4th 1117 is the right one. Aside from the fact that *Woods* has in the interval been depublished and can no longer be cited (Cal. Rules of Court, rules 976, 977, 979), we agree with the trial court that *Bracamonte* was correctly decided. It thus suffices to say that, for the reasons explained by Division Four of our court in *Bracamonte*, the sentences were properly stayed, not stricken. (*People v. Bracamonte, supra*, 106 Cal.App.4th at pp. 713-714.)

DISPOSITION

The judgment is affirmed.

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VOGEL, J.

We concur:

SPENCER, P.J.

SUZUKAWA, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.